



Comptroller General  
of the United States

Washington, D.C. 20548

Record

## Decision

**Matter of:** Blaze Construction Company, Inc.  
**File:** B-248008  
**Date:** June 17, 1992

Daniel S. Press, Esq., Van Ness, Feldman & Curtis, for the protester.  
Raymond C. Lancer, for HCC Joint Venture, an interested party.  
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.  
James Pecora and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Bureau of Indian Affairs (BIA) area office's determination that a joint venture meets Indian economic enterprise eligibility criteria under a Buy Indian Act procurement is reasonable, notwithstanding a contrary recent finding by another BIA area office, where the determining area office found, based on its independent investigation, that an Indian owned at least 51 percent of the enterprise, was involved in the daily business management of the enterprise, and would receive the majority of the enterprise's earnings.

### DECISION

Blaze Construction Company, Inc. protests the award of a contract to HCC Joint Venture under invitation for bids (IFB) No. SB-91-0050, issued by the Bureau of Indian Affairs (BIA), Department of the Interior, Phoenix, Arizona, for road construction on the San Carlos Indian Reservation, Arizona.

We deny the protest.

The BIA Phoenix area office, in accordance with the Buy Indian Act, 25 U.S.C. § 47 (1988), issued the IFB as a total "Buy Indian" set-aside, under which only Indian economic enterprises were eligible for award. An Indian economic enterprise is defined in the solicitation and applicable BIA guidelines as:

"[A]ny business entity . . . which: (1) is at least 51 percent owned by one or more Indian(s) or

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(an) Indian Tribe(s); (2) one or more of those owners must be involved in daily business management of the economic enterprise; and (3) the majority of the earnings must accrue to such Indian person(s)."

Two bids were received in response to the IFB. HCC, a joint venture between Calvin Corporation and Hunter Contracting Company, submitted the low bid. The president and sole shareholder of Calvin is a Navajo Indian. Calvin owns a 51 percent interest in HCC. No Indians own any interest in Hunter. On August 20, 1991, Blaze, the other bidder, protested to the contracting officer that HCC was not a legitimate Indian-owned enterprise. After the contracting officer denied the protest and awarded the contract to HCC, Blaze filed this protest with our Office.

Blaze contends that the BIA Phoenix office's determination that HCC is a valid "Buy Indian" concern is arbitrary and unreasonable, particularly given that the BIA Albuquerque office had reached a contrary finding during the same time period, a finding that our Office found reasonable in Calvin Corp., B-245768, Jan. 22, 1992, 92-1 CPD ¶ 98. Blaze argues that the Phoenix office insufficiently addressed the concerns noted by the Albuquerque office and discussed in our decision. In particular, Blaze contends that HCC fails to meet the eligibility requirements because an Indian owner is not involved in the daily business management of the enterprise and might not accrue the majority of the profits of the joint venture.

The Buy Indian Act, 25 U.S.C. § 47, provides that:

"So far as may be practicable Indian labor shall be employed, and purchases of the products . . . of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

The Secretary of the Interior, acting through the BIA Commissioner, has broad discretion and authority to implement this statute, particularly in defining the criteria a firm must meet to qualify as an Indian enterprise and determining the quantum of evidence required to establish compliance with the established criteria. White Buffalo Constr. Inc., 67 Comp. Gen. 206 (1988), 88-1 CPD ¶ 61; Northwest Piping, Inc., B-232644, Jan. 23, 1989, 89-1 CPD ¶ 53. Accordingly, we will disturb such decisions only where they are shown to be arbitrary, unreasonable, or in violation of law or regulation. Id. A decision is not arbitrary or unreasonable merely because two BIA area offices differ as to the eligibility of the same Indian-owned firm on different procurements. Calvin Corp., supra. Each federal procurement stands on its own; the BIA's determination as to

"Buy Indian" eligibility may be different under the particular circumstances of a different procurement. Id. From our review, the record indicates that the Phoenix BIA determination was reasonable, notwithstanding the recent contrary decision by the Albuquerque BIA.

The Albuquerque office decided that HCC was not an eligible Indian enterprise for two reasons: (1) no Indian owner was involved in daily business management and (2) it appeared that the majority of the profits might not accrue to an Indian. Id. The determination that no Indian owner was involved in daily business management was based on the following reasons: (1) the Calvin president, who was the only Indian owner and was apparently in ill-health, resided 150 miles away from Phoenix, Arizona, where both Calvin and Hunter were located; (2) at the interview with agency personnel, the Calvin president only briefly confirmed the decisions of the other Calvin and Hunter officials, which indicated his limited involvement in the business; (3) the Calvin president's background was in computer science; (4) all contract specification problems would be referred to the Hunter staff; (5) Hunter would provide all operating capital for the venture and all construction equipment, unless the equipment could be leased from other Indian concerns; (6) Hunter would control all negotiations for the venture's bonding, banking, loans, and letters of credit; and (7) Hunter would perform all bookkeeping and accounting services. Id.

Partly in response to the concerns noted by the BIA Albuquerque office, the Phoenix office referenced the following reasons in support of the conclusion that the Calvin president would be involved in daily business management of the enterprise: (1) the Phoenix staff had consistently been able to reach the Calvin president either at the HCC office, which is housed in the Calvin offices in Phoenix, or on the project sites; (2) the Calvin president knowledgeably answered all questions posed to him;<sup>1</sup> (3) although his educational background is in computer science, the Calvin president had 14 years of experience in construction; (4) equipment would be obtained from Hunter only if it was unavailable from other sources; (5) the

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<sup>1</sup>Reasons (1) and (2) were not supplied in the Phoenix BIA contracting officer's initial decision, which determined that HCC was a qualified economic enterprise, but were contained in the report on the protest. While we accord greater weight to contemporaneous materials, we consider the entire record, including statements made in response to a protest, in determining the reasonableness of any agency action. See DynCorp, 71 Comp. Gen. 128 (1991), 91-2 CPD ¶ 575, fn 13.

financial accounts of HCC would be maintained by an officer of Calvin; (6) 99 percent of the work would be performed by Calvin employees; (7) as sole shareholder, the Calvin president directly controlled the Calvin Board of Directors and, as president, he implemented the Board's decisions; and (8) the Calvin president had been involved in daily business management for another BIA project in Phoenix, and there was every reason to expect that the Calvin president would be similarly involved in the new project.

From our review, it appears that both the Albuquerque and Phoenix BIA offices independently reviewed the degree to which an Indian controlled the daily business management of HCC, apparently substantially basing their contrary determinations on their respective interviews with HCC officials, including the Calvin president. It is apparent that the Phoenix BIA was persuaded by the interview, and other information, that the Calvin president exercised daily business management of the enterprise. From our review of the BIA guidelines, there is no requirement that an Indian owner manage each construction project, as is suggested by Blaze, but only that an Indian be involved in the daily business management of the enterprise. Based on our review, the Phoenix BIA office could reasonably find, based on the information it gathered and giving due weight to the Albuquerque BIA office's findings, that an Indian exercised daily business management of HCC, notwithstanding the earlier contrary determination by the Albuquerque office.

The Albuquerque office also questioned whether a majority of profits of HCC would accrue to an Indian. The Albuquerque office reported that: (1) under the terms of the Calvin Corporation by-laws, the non-Indian management could receive the majority of the profits from the venture; and (2) under the terms of the HCC joint venture agreement, the majority of the profits could accrue to Hunter, if Calvin and Hunter modified their capital contributions so that Hunter contributed more than 50 percent of the capital.

On the other hand, the contracting officer of the Phoenix BIA determined that the majority of the profits would accrue to an Indian. First, the Phoenix BIA found that as sole shareholder, the Indian Calvin president will accrue the majority of the profits since the distribution of these profits to the non-Indian members of the company will be at his sole discretion. Although the Calvin Corporation by-laws allow the Board of Directors to unilaterally increase their own salaries, the Phoenix BIA found this was not a likely possibility since the Calvin president, as sole shareholder, has the power to remove any director from the board.

Moreover, under the joint venture agreement, Calvin will receive 51 percent of the profits based on its joint venture. While it is true that the joint venture agreement allows Calvin and Hunter to change their respective percentage interests in the venture, the Phoenix BIA notes that the contract expressly requires a self-certified Indian enterprise to maintain its Indian-owned status during the term of the contract--a provision that apparently would be violated if the joint venture were altered to deprive the Indian from the majority of the earnings. The contracting officer reports that a condition will be added to the awarded contract requiring immediate notification should HCC's Indian status change. Under the circumstances, the BIA could reasonably find that an Indian will receive the majority of the enterprise's profits, notwithstanding the Albuquerque office's contrary finding.

Based on the foregoing, we conclude that the Phoenix BIA's determination that HCC meets the "Buy Indian" eligibility requirements is reasonable.

The protest is denied.



James F. Hinchman  
General Counsel